

SERVED: May 14, 1992

NTSB Order No. EA-3557

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of April, 1992

ROBERT A. HAMPTON,

Applicant,

v.

51-EAJA-SE-7508RO

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Respondent.

OPINION AND ORDER

The applicant has appealed from the decision and order¹ Administrative Law Judge Patrick G. Geraghty issued in this proceeding on November 9, 1989, denying his application for an award of fees and expenses under the provisions of the Equal Access to Justice Act, as amended, 5 U.S.C. §504 (EAJA)

¹An excerpt from the hearing transcript containing the decision is attached.

and the Board's Rules implementing that Act, 49 CFR Part 826. The law judge found that the applicant's claim should be denied because the Administrator was substantially justified in his decision to litigate the case, notwithstanding the fact that applicant prevailed in his appeal of the initial decision before the Board.²

On appeal applicant asserts that the Administrator was not substantially justified because his position was not reasonable in law or in fact.³ For the reasons that follow, we agree with the applicant and we will grant his appeal and reverse the denial of his EAJA application.

The applicant is the holder of an aircraft dispatcher certificate. On May 21, 1986, the Administrator issued an order suspending applicant's certificate on allegations that he had violated FAR §§91.20 and 91.9 by dispatching an aircraft into North Atlantic Minimum Navigation Performance Specifications (NAT-MNPS) airspace when that aircraft was not approved to operate therein. The theory of the Administrator's case was that by issuing the flight dispatch release, applicant had caused the aircraft to be operated in violation of FAR §91.20, within the meaning of the term

²The Board reversed the initial decision and the Administrator's order of suspension. Administrator v. Hampton, 5 NTSB 2410 (1987).

³The Administrator has filed a brief in reply.

"operate" contained in FAR §1.1.⁴ The Administrator filed the order as the complaint. The applicant then filed a motion to dismiss the complaint on the basis that: (1) the complaint was stale under the provisions of the Board's stale complaint rule, 49 CFR Part 821.33; and (2) the operation described in the complaint was a charter flight operation which did not require the use of a licensed dispatcher. The Administrator filed a response to the motion to dismiss in which he addressed only the stale complaint issue. On July 28, 1986, Administrative Law Judge Jerrell R. Davis denied the motion on the grounds that the complaint was not stale. The law judge's order did not address the other issue raised by applicant. The proceeding was subsequently assigned to another law judge.

On December 24, 1986, applicant moved for summary judgment. Applicant asserted numerous grounds for summary judgment, including the re-assertion of his claim that the operation was a charter operation and did not require the use of a certificated aircraft dispatcher. Appended to applicant's motion were a large number of documents and affidavits including Appendix "G," which raised the further

⁴FAR §1.1 defines "operate" as follows:

"Operate" with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).

claim that the pilot in command and not applicant was responsible for the operation under the FAR. The Administrator's only reply was that the issues before the law judge were "complex," and that therefore there were matters of fact which could not be resolved by summary judgment. The law judge denied the motion on these grounds. On January 21, 1986, the law judge affirmed the Administrator's suspension order. Applicant appealed that decision to the full Board.

On December 4, 1987, we reversed the law judge's decision, finding that applicant breached no duty under the FAR and could not be held liable for any failure by the aircraft's crew to request an appropriate deviation authorization from air traffic, in accordance with the provisions of FAR § 91.20.

Under 5 U.S.C. §504(a)(1), an agency is not required to pay attorney or agent fees and other expenses to a prevailing applicant where its position was substantially justified or when special circumstances make an award unjust. To establish "substantial justification" the government must "...show (1) that there is a reasonable basis in truth for the facts alleged in the pleadings; (2) that there exists a reasonable basis in law for the theory it [the Government] propounds; and (3) that the facts alleged will reasonably support the legal theory advanced." McCrary v. Administrator, 5 NTSB 1235, 1238 (1986), citing United States

v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1985). The relevant inquiry is whether the government's case is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). The Court phrased this test as requiring a "reasonable basis both in fact and law." Id. This is to be judged as a whole, and should include an assessment, as relevant, of whether there was sufficient reliable evidence initially to prosecute the matter. Administrator v. Catskill Airways, Inc., 4 NTSB 799 (1983). EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases; the statute is intended to caution agencies to carefully evaluate their cases, not to prevent them from bringing those that have some risk. Id., and Administrator v. Wendler, 4 NTSB 718 (1983), aff'd Wendler v. NTSB, No. 83-1905 (10th Cir. February 28, 1985).

The Administrator argues that he was substantially justified in litigating this enforcement action because the legal theory which he wished to advance, i.e., that a certificated aircraft dispatcher could be found to have "operated" an aircraft and be liable for that operation under the FAR, concerned a novel or credible extension of the law. While we agree that Congress did not intend by enacting EAJA to deter the Government from advancing credible extensions of

the law, we are not persuaded that this proceeding constituted an appropriate occasion for attempting to define the scope of a dispatcher's responsibility for an aircraft he has released.

Even if we were to assume that the Administrator was excusably unaware of the nature of the aircraft's status as a charter operation before the inception of these proceedings, he was put on notice of that circumstance when applicant filed his motion to dismiss. Had that filing been properly evaluated, the Administrator presumably would have reconsidered the soundness of his legal position in the enforcement action. Instead, the Administrator failed to address the legal issues raised by applicant in response either to the motion to dismiss or the subsequently filed motion for summary judgment. Because our role in reviewing EAJA applications is to examine the administrative record as a whole and determine whether the Administrator was substantially justified at each step of the proceedings. Alphin v. National Transportation Safety Board, 839 F.2d 817 (D.C. Cir. 1988), we are constrained to find that the Administrator can not be found here to have been substantially justified in pursuing this case once the applicant raised significant legal defenses, upon which he ultimately prevailed, that the Administrator either could not refute or chose to ignore. We will therefore reverse the law

judge's decision in this regard.

Having found that whatever substantial justification the Administrator may have had at the outset of the proceeding did not survive his failure to answer respondent's pleadings,⁵ we must determine what fees and expenses, if any, applicant is entitled to under the terms of the statute and the Board's Rules.

Applicant's claim, in the amount of \$12, 238.05, is for the fees and expenses charged to him by a Mr. Konop and a Mr. Daisey, both of whom described themselves as "consultants" in NTSB proceedings. The Administrator asserts that applicant is not entitled to any claim for reimbursement for their services, because applicant was a pro se litigant who signed his own pleadings and who was not represented by an attorney, except at the hearing.⁶ We do not think our analysis should end simply because an applicant has signed his own pleadings, particularly where the record establishes that those pleadings were prepared by individuals other than the applicant. This case is clearly distinguishable from Whittle v. Administrator, 5 NTSB 727 (1985), relied on by the Administrator, where that applicant incurred no expenses in securing his defense and claimed only the value of his own

⁵Accordingly, any award we make will be for fees and expenses claimed after the filing of the Administrator's response to the motion to dismiss, on June 20, 1986.

⁶There is no claim for the attorney services at the hearing.

time expended in representing himself.

Moreover, the Administrator's claim⁷ that he has no knowledge of the exact nature of the services rendered by either Mr. Konop or Mr. Daisey cannot be reconciled with the EAJA application and applicant's reply to the Administrator's opposition to the application, both of which explain in extensive detail that both individuals actually prepared all of the motions and other pleadings which applicant signed and filed,⁸ and that they assisted applicant's counsel in his preparation both before and during the hearing. The Administrator's reliance on Moore v. Administrator, 5 NTSB 335 (1985), where we rejected an EAJA claim for vagueness, is misplaced. Attached to applicant's EAJA application are itemized statements of services rendered and expenses incurred on behalf of applicant by Mr. Konop and Mr. Daisey. Each itemized statement contains dates, description of services rendered, numbers of hours, hourly rate charged, and total claimed. Following Mr. Konop's itemized statement is a glossary further defining the nature of the services rendered, i.e., investigation, analysis, discovery, motions, hearing consultation, appeal study, and appeal project. Similarly, Mr.

⁷Administrator's reply brief at p. 21.

⁸These claims are corroborated by our review of the pleadings, which applicant may have signed but which were well-researched and obviously prepared by individuals who had a great familiarity with the Board precedent and EAJA law, notwithstanding their lack of licenses to practice as attorneys.

Daisey's statement further describes his services to applicant as telephone consultation, case analysis, investigation, attorney briefing and preparation, and hearing consultation.

The Administrator further argues that since Mr. Konop and Mr. Daisey are not attorneys, they should be characterized as expert witnesses, and since neither testified or prepared any studies or engineering reports, neither can claim to be experts for which the EAJA contemplates reimbursement of fees. The argument that in order to claim fees under Section 504 and the Board's Rules one must be an attorney is without legal foundation. Both the statute and our expressly regulations allow for the claim of fees of either an attorney or other representative or agent.⁹

Finally, the Administrator contends that certain fees and expenses claimed should be rejected on the basis that they are not sufficiently documented. We disagree. We find the itemized statements more than sufficient, particularly in the absence of any particularized objections by the Administrator before either the law judge or the Board as to the

⁹ 5 USCA § 504(2) and 49 CFR §826.6 allow for awards based on fees and expenses of any attorney, agent, or expert witness. It is patent that a litigant in a judicial proceeding may only be represented by an attorney. Compare 28 USC §2412, the judicial EAJA statute, which allows awards based only on attorney fees. However, our rules provide for representation by non-attorneys, 49 CFR §821.6(a) and do not require entries of appearance by a representative other than an attorney, 49 CFR 821.6(d).

reasonableness of any fee or expense claimed.¹⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is granted;
2. The law judge's decision and order is reversed; and
3. The Administrator is to pay the applicant a total of \$10, 611.50.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰The only specific objection made by the Administrator concerns the claim for telephone, xerox, and postage expenses. We consider adequate the fact that these expenses were listed separately as line items on the bills to applicant. Conner Air Lines, Inc. v. Administrator, NTSB Order No. EA-2920 (1989) citing Rooney v. Administrator, 5 NTSB 776 (1985).